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No. 935

In the Supreme Court of the United States

OCTOBER TERM, 1943

MILES LABORATORIES, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 45–48) is reported at 140 F. (2d) 683. The opinion of the district court (R. 35–42) is reported at 50 F. Supp. 434.

JURISDICTION

The judgment of the Court of Appeals was entered February 7, 1944 (R. 49). The petition for a writ of certiorari was filed April 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The pertinent provisions of the Federal Declaratory Judgments Act and of the Federal Trade Commission Act are printed in the Appendix, pp. 11–18, *infra*.

QUESTION PRESENTED

Whether the district court properly dismissed an action for a declaratory judgment brought by petitioner against the Federal Trade Commission and its individual members to determine the authority of the Commission to issue a potential complaint under Section 5 of the Federal Trade Commission Act.

STATEMENT

Petitioner is an Indiana corporation engaged in the manufacture, sale and distribution in interstate commerce of medicinal preparations known as "Dr. Miles' Nervine," "Dr. Miles' Nervine Tablets," and "Dr. Miles' Anti-Pain Pills" (R. 3). On November 17, 1942, the Federal Trade Commission, acting through its Chief Trial Examiner, notified petitioner that, on the basis of an investigation by the Commission, it appeared that petitioner had failed adequately to reveal the potential danger to health that might result from the improper or continued use of these products, and that it seemed that the methods used by petitioner fell within the definition of the term "unfair methods of competition in commerce"

which the Commission was required to prevent (R. 25). The Commission offered petitioner an opportunity to enter into a stipulation whereby petitioner would admit that it had disseminated advertisements for the purpose of inducing the purchase of these medicinal preparations; that "Dr. Miles' Nervine" and "Nervine Tablets" were advertised for use in cases of functional nervous disturbances, nervous headaches, sleeplessness and restlessness; that the caution appearing on the containers in which these products were packaged failed to include a warning to the effect that excessive use of the products might result in mental derangement and skin eruptions; that "Dr. Miles' Anti-Pain Pills" were advertised for use by persons who occasionally suffered from distress of headache, neuralgia, muscular or periodic pains, and that the caution appearing on the packages failed to include a warning that excessive use of this drug might cause collapse or dependence upon the drug; and that the advertisements of "Nervine" and "Anti-Pain Pills" failed to contain warnings or cautionary statements pertaining to the use of the products. The proposed stipulation then provided that petitioner would either cease and desist from disseminating any advertisements which failed to reveal that excessive use of the preparations might be dangerous in the respects mentioned; or, if the directions for use of the preparations on the labels contained adequate and specific warnings of their potential

danger to health in such respects, the advertisements might contain only the statement "Caution, Use Only as Directed". (R. 28–33.) In the letter enclosing the stipulation, the Chief Trial Examiner stated (R. 26):

> It must be understood that it is your right to have a formal complaint issue and tried in the manner provided by the statute and practices of the Commission; and, if for any reason the disposition of this matter by voluntary cessation is not acceptable to you, your right of defense will be assured by the statutory procedure.

Petitioner declined to execute the stipulation, and instituted an action in the District Court for the District of Columbia against the Federal Trade Commission and its individual members for a declaratory judgment to the effect that the Commission had no right to determine the legality of petitioner's labeling or to force petitioner to vary the language thereof, and that the Commission and its members were exceeding their authority in seeking to compel petitioner to include in its advertisements warnings in respect of consequences which might result from use of the products in a manner other than that specified in the directions on the labels. The complaint alleged that the action of the Commission in demanding that petitioner submit to the terms of the proposed stipulation indicated an intention to assume jurisdiction over petitioner's labeling of

its products and that the threatened action was in excess of the power of the Commission in that the Federal Trade Commission Act does not require warnings against use of products in excess of the recommended dosage. (R. 1–17.)

The respondents' motion to dismiss the complaint for lack of jurisdiction was sustained by the district court on the ground that the question of the Commission's jurisdiction to proceed was a matter to be determined in the first instance by the Commission itself, and that the statutory provision for review of the Commission's action by the appropriate court of appeals was the exclusive method for obtaining judicial review of the Commission's decision (R. 34–43). The judgment of the district court was affirmed on appeal (R. 49).

ARGUMENT

The only action with which petitioner was threatened at the time it commenced this suit in the district court was the initiation of a proceeding under Section 5 of the Federal Trade Commission Act (15 U. S. C. 45) looking toward the issuance of a cease and desist order by the Commission. Petitioner's complaint refers (R. 9–10, 15) to the possibility of criminal penalties under Section 14 (a) of the Act (see Appendix, *infra*, pp. 16–17), but the letter from the Commission's Chief Trial Examiner enclosing the proposed stipulation, a copy of which was annexed to the com-

plaint as an exhibit, indicates clearly that, in the event the stipulation was not accepted, the Commission proposed to issue a complaint to be "tried in the manner provided by the statute and practices of the Commission" (R. 26).[1] Under the statute, such a complaint may issue "whenever the Commission shall have reason to believe" that any person has been or is using any unfair method of competition. Hence, despite the fact that the complaint seeks a declaration that the Commission has no authority to compel petitioner to perform certain acts (see R. 16–17), the suit for a declaratory judgment actually seeks to preclude the Commission from exercising its discretion in the first instance as to whether it has "reason to believe" that petitioner is engaged in unfair practices.

Petitioner in effect concedes that, under the rule laid down by this Court in *Myers* v. *Bethlehem Corp.*, 303 U. S. 41, it would not be entitled to injunctive relief against the Commission under the circumstances here presented; but it argues (Pet. 11) that it is entitled to relief by way of a declaratory judgment. However, the *Myers* case

[1] The possibility of criminal prosecution would, in any event, be too remote to give rise to an actual controversy since, under Section 16 of the Federal Trade Commission Act, violations must first be certified to the Attorney General for prosecution, and there is no allegation in the complaint that such action was contemplated by the Commission or that the Attorney General was threatening to proceed with a prosecution. See *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, 174; *Helco Products* v. *McNutt*, 137 F. (2d) 681 (App. D. C.).

turned not upon the special criteria governing injunctive relief, but upon fundamental principles governing judicial review of the action of administrative tribunals. The *Myers* case held that an injunction should have been refused both because the question involved was one within the primary jurisdiction of the administrative agency and because exclusive jurisdiction to review the administrative action had been vested by Congress in the appropriate court of appeals. The identical factors are present in the instant case.

Petitioner argues that the Commission intends to exceed its jurisdiction by regulating labeling, over which it has no control, and by misinterpreting the definition of false advertising in Section 15 of the Federal Trade Commission Act (Appendix, *infra,* pp. 17–18) to include failure to warn against excessive use of the product. It contends that its allegations in these respects present questions of law as distinguished from the question of fact (the interstate nature of the employer's business) involved in the *Myers* case (Pet. 12, 16–18). It is clear, as the court below pointed out (R. 47), that the proposed stipulation offered by the Commission purported to regulate only false advertising, and that the proposed change in the labeling was offered only as an alternative method of correcting the advertising. The question of the falsity of petitioner's advertisements is as much a matter for the Commission's initial determination as was the question of the inter-

state character of the business involved in the *Myers* case. Whether failure to include warnings against danger from excessive use constitutes false advertising within the broad definition of Section 15, may well depend upon matters of fact, as, for example, whether the representations in the advertisements tend to cause excessive use by persons having the symptoms for which the remedy is indicated, or whether excessive use by such persons is in actual practice customary or usual (cf. *Aronberg* v. *Federal Trade Commission,* 132 F. (2d) 165 (C. C. A. 7)). In any event, it is a question which Congress has relegated to the Commission for initial determination. Hence, resort to judicial review in advance of an administrative determination is premature, by whatever means it is sought. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 130; *Elliott* v. *American Manufacturing Co. of Texas,* 138 F. (2d) 678 (C. C. A. 5); *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97 (C. C. A. 5), certiorari denied, 299 U. S. 559; *Washington Terminal Co.* v. *Boswell,* 124 F. (2d) 235, 251 (App. D. C.), affirmed, 319 U. S. 732.

Furthermore, Section 5 (d) of the Federal Trade Commission Act (Appendix, *infra,* p. 13) provides that the jurisdiction of the court of appeals to affirm, enforce, modify or set aside orders of the Commission shall be exclusive. The provisions for review are unquestionably adequate to

insure due process. *Ostler Candy Co.* v. *Federal Trade Commission,* 106 F. (2d) 962, 964 (C. C. A. 10), certiorari denied, 309 U. S. 675; *National Candy Co.* v. *Federal Trade Comm'n,* 104 F. (2d) 999 (C. C. A. 7), certiorari denied, 308 U. S. 610. Under such circumstances, the district court is without jurisdiction to issue an injunction. *Myers* v. *Bethlehem Corp.,* 303 U. S. 41; *Chamber of Commerce* v. *Federal Trade Commission,* 280 Fed. 45, 47–49 (C. C. A. 8). It has no greater power to issue a declaratory judgment, for the Declaratory Judgments Act did not transform the carefully designed statutory procedure which confers jurisdiction on one class of courts to the exclusion of others. *Dochler Metal Furniture Co.* v. *Warren,* 129 F. (2d) 43, 45 (App. D. C.); *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. (2d) 97, 100 (C. C. A. 5), certiorari denied, 299 U. S. 559. Compare *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 300–301.[2] Manifestly, the fact that the administrative proceeding has not yet been instituted and that petitioner is thus

[2] The state cases cited by petitioner in which declaratory judgments have been used to determine the powers of state administrative agencies (Pet. 15) are inapposite, since many factors are involved other than that an administrative agency is a party. It may be noted, however, that the issues of primary jurisdiction of administrative agencies and the exclusiveness of the statutory remedy are factors considered in state as well as federal cases. See, for example, *Rahoutis* v. *Unemployment Compensation Commission,* 136 P. (2d) 426 (Ore. 1943), cited by petitioner. See also Borchard, *Declaratory Judgments* (1941 ed.), pp. 65, 237, 342–344.

one step further removed from the completion of its administrative remedy does not, as petitioner claims (Pet. 12), give it a right which it would not have had if the proceeding had actually been commenced. Cf. *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U. S. 375, 385.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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